In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-995

VINCENT ANTHONY CIRAOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this collateral attack on his conviction, petitioner contends that he was deprived of effective assistance of counsel at trial and that the district court erred in denying his motion for relief under 28 U.S.C. 2255 without an evidentiary hearing.

On March 14, 1972, following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to distribute and two counts of unlawful distribution of counterfeit currency in violation of 18 U.S.C. 371, 472, 473, and 2. He was sentenced to five years' imprisonment on the conspiracy count, a consecutive term of eleven years' imprisonment on one of the distribution counts, and a term of ten years' imprisonment on the third count, to be served concurrently with the sentences on the first two counts. The court of appeals affirmed the conviction, 471 F.2d 419 (C.A. 5), and this Court denied certiorari, 411 U.S. 967.

On March 12, 1974, petitioner moved under 28 U.S.C. 2255 to vacate his conviction on the ground that he had been denied the effective assistance of counsel at trial. The United States District Court for the Southern District of Florida denied the motion without a hearing. The court of appeals affirmed without opinion (Pet. App. A).

Petitioner was indicted with three co-defendants. Prior to trial, co-defendant Julian Wilkerson pleaded guilty to the conspiracy charge; he testified as a government witness.[1] The facts at trial revealed a counterfeit currency transaction in which undercover Secret Service agents negotiated with some of petitioner's co-defendants for the purchase of $100,000 in counterfeit currency. An agreement was reached, and delivery of the currency commenced on February 2, 1972, at the Fort Lauderdale International Airport, where petitioner delivered a brief case containing $40,000 in counterfeit bills to Wilkerson (Tr. 240-241).[2] Both men then drove in separate automobiles to the prearranged location for the transfer, co-defendant Otis T. Curry's bail bond office, which was under surveillance by government agents.

Wilkerson entered Curry's office, while petitioner stood across the street. Upon discovering only $40,000 in the brief case, Wilkerson left the office to hold a brief conversation with petitioner, which was observed by three agents (Tr. 372-373, 385-387, 418-421). Wilkerson testified that at that time he inquired about the delivery date of the missing $60,000 in counterfeit currency (Tr. 244-

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[1]Co-defendants Curry and Siano were tried with petitioner and were also convicted on all counts of the indictment.

[2]Although the planned transaction was to total $100,000, only $40,000 was delivered and seized.

245). Shortly after Wilkerson reentered the office, and upon an undercover agent's predetermined signal, six agents converged upon Curry's office to assist in the arrests. Agent James, who had witnessed Wilkerson's conversation with petitioner, observed petitioner turn and walk hurriedly away from the office (Tr. 387). He then arrested and searched petitioner, discovering $2,000 in genuine currency and a slip of paper bearing the words "Suter-Curry" and the address of the Suter-Curry bail bond office, where the transaction occurred (Tr. 387-389). This slip of paper was introduced at trial without objection except as to relevancy from petitioner's counsel (Tr. 388-389).

1. Petitioner contends that his trial counsel's failure to pursue a motion to suppress more vigorously or to object to the introduction of the document containing co-defendant Curry's name and address denied him the effective assistance of counsel.

Effective counsel does not mean perfect counsel, but only reasonably competent counsel rendering reasonably effective assistance. See, *e.g.*, *McMann* v. *Richardson*, 397 U.S. 759, 771; *Herring* v. *Estelle*, 491 F.2d 125 (C.A. 5). Thus, counsel does not render ineffective assistance because he chooses not to request suppression of evidence, particularly when his decision is a reasonable trial tactic. *United States* v. *Meyer*, 417 F.2d 1020, 1024 (C.A. 8). Here, petitioner's counsel chose to portray him as an innocent wig salesman who thought he was delivering a shipment of wigs to co-defendant Curry, who was also a wig salesman. This strategy is disclosed in counsel's questioning of Wilkerson (Tr. 308-310) and again in his closing argument (Tr. 606-607). In this context, it was reasonable for petitioner to possess the address of Curry's office, from which wigs were sold.

With this trial strategy in mind, counsel apparently decided not to object to the introduction of the document removed from petitioner after arrest, choosing instead to contest its relevance.[3] The wisdom of this trial strategy is underscored by the fact that such an objection manifestly could not have succeeded, since ample probable cause supported petitioner's arrest. Moreover, even had the document been suppressed, Wilkerson's testimony concerning petitioner's participation in the conspiracy and the testimony of government agents concerning petitioner's conversation with Wilkerson shortly before the arrests provided sufficient evidence to support the jury's verdict. Petitioner may not now complain simply because his trial counsel's strategy was not successful. See, *e.g.*, *United States* v. *Hayes,* 444 F. 2d 472, 475 (C.A. 5), certiorari denied, 404 U.S. 882. In short, viewing the record as a whole, the decision of defense counsel to abandon the motion for suppression and allow the document removed from petitioner after arrest to be introduced without objection did not deprive petitioner of the effective assistance of counsel.

2. Petitioner contends that the trial court erred in denying his motion under 28 U.S.C. 2255 without an evidentiary hearing. However, Section 2255 does not require an evidentiary hearing if the motion is conclusively inadequate on its face or is shown to be inadequate by the files and records of the case. A motion is inadequate on its face if its basic claim is not supported by sufficient factual allegations. *Sanders* v. *United States,* 373 U.S. 1, 19. The

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[3]Upon introduction of the document, petitioner's counsel stated: (Tr. 389): "The defendant Ciraolo has no objection to this being introduced in evidence, and I would like to have the United States Attorney make some statement to show what the relevancy is in asking these questions, what the relevancy of it is in this case."

sufficiency of factual allegations may be determined by assuming *arguendo* their truth and then assessing their sufficiency in the light of relevant constitutional standards and the record. See *Moran* v. *Hogan*, 494 F.2d 1220 (C.A. 1). As discussed above, petitioner's factual allegations do not support a claim of ineffective assistance of counsel and thus fail to pass this threshhold test. His motion was therefore inadequate on its face.

Even assuming that petitioner's factual allegations adequately supported a claim of ineffective assistance of counsel, his allegations were nevertheless refuted by the record, which, as indicated above, shows that trial counsel's disputed decisions were motivated by a reasonable trial strategy (Tr. 308-310, 606-607). Thus, petitioner's motion was properly denied by the district court without a hearing. See, *e.g.*, *Hodges* v. *United States*, 368 U.S. 139, 140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

DOJ-1975-04